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No. 79-1171

IN THE

Supreme Court of the United States

October Term, 1979

STATE OF MINNESOTA,

Petitioner,

vs.

CLOVER LEAF CREAMERY COMPANY, PHILLIPS PETROLEUM COMPANY, MARIGOLD FOODS, INC., UNILOY DIVISION OF HOOVER UNIVERSAL, INC., WEBER & BARLOW STORES, INC., THE SOCIETY OF THE PLASTICS INDUSTRY, INC., WELLS DAIRY, INC., and M-H PACKAGING SYSTEMS, INC.

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

REPLY BRIEF

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INDEX

	Page
Introduction	2
Argument	3
The Act Does Not Constitute An Unconstitutional Interference With Interstate Commerce.	3
I. The Act Is Not Void As Protectionist Legislation.	4
II. The Act Creates No Burdens On Commerce Which Outweigh Its Benefits.	9
A. The Act Does Not Burden Interstate Commerce In Petroleum Products.	10
B. The Act Does Not Impose An Impermissible Burden On The Plastics Industry Generally.	11
C. The Act Does Not Impose An Unconstitutional Burden On Commerce In Packaging Equipment.	12
D. The Act Does Not Unconstitutionally Burden Interstate Commerce In Containers.	13
E. The Act Does Not Unconstitutionally Burden Interstate Sales By Local Dairies.	14
F. The Act Does Not Unconstitutionally Burden Minnesota Sales By Out-Of-State Dairies.	15
G. There Is No Showing Of Unconstitutional Burden On Retailers.	16
Conclusion	21

CITATIONS

Page

Federal Cases:

Bibb v. Navajo Freight Lines, Inc.,
359 U.S. 520 (1959) 9, 17

Dean Milk Co. v. Madison,
340 U.S. 349 (1951) 16

Exxon Corp. v. Governor of Maryland,
437 U.S. 117 (1978) 3, 12, 13, 19

H.P. Hood & Sons, Inc. v. DuMond,
336 U.S. 525 (1949) 17

Hughes v. Oklahoma, 441 U.S. 332 (1979) 17

Hunt v. Washington State Apple Advertising
Comm'n., 432 U.S. 333 (1977) 6, 7, 17

Lewis v. B.T. Investment Managers, Inc.,
100 S.Ct. 2009 (1980) 6, 16

Pacific States Box & Basket Co. v. White,
296 U.S. 176 (1935) 17

Philadelphia v. New Jersey,
437 U.S. 617 (1978) 3, 6, 7, 16

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 9, 17

Polar Ice Cream and Creamery Co. v. Andrews,
375 U.S. 361 (1964) 6

Proctor and Gamble Company v. City of Chicago,
509 F.2d 69 (7th Cir. 1975),
cert. den., 412 U.S. 978 (1975) 19, 20

Raymond Motor Transportation, Inc. v. Rice,
434 U.S. 429 (1978) 9, 16

South Carolina State Highway Dept. v. Barnwell
Bros., 303 U.S. 177 (1938) 3

United States v. O'Brien, 391 U.S. 367 (1968) 5

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INTRODUCTION

The brief for plaintiffs-respondents (hereinafter "the plaintiffs") has raised an argument which was neither considered by the Minnesota Supreme Court nor addressed in the State's brief: the argument that banning throwaway plastic milk bottles discriminates against, or unduly burdens, interstate commerce.[1] This reply brief is submitted in response to this new argument. The State adheres to the equal protection and due process arguments advanced in its earlier brief, and the absence from this reply brief of point-by-point corrections of the inaccuracies and extra-record factual assertions which permeate the briefs of plaintiffs and their supporting *amici curiae*[2] should not be construed as acquiescence in their misstatements.

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[1] While the trial court concluded that the Act, Minnesota Laws of 1977, Chapter 268, unreasonably burdened interstate commerce, (A.23), the Minnesota Supreme Court stated that "because of our decision on equal protection grounds, we do not consider that issue." (A.45, n. 20.)

[2] *See, e.g.*, Brief of Minnesota Dairies Federation, *Amicus Curiae*, (hereinafter Dairies Brief) at 8, which argues almost entirely from factual assertions not contained in the record, and Respondents' Brief at 19, 36, citing back issues of the *Wall Street Journal*.

ARGUMENT

THE ACT DOES NOT CONSTITUTE AN UNCONSTITUTIONAL INTERFERENCE WITH INTERSTATE COMMERCE.

U.S. Const. art. I, §8, cl. 3, provides:

> The Congress shall have power:
>
> . . . .
>
> To regulate commerce . . . among the several states, ...

This provision has been interpreted to protect a national interest in the free passing of commerce among the several states and to prevent individual states from interfering with that national interest.

This commerce clause is not, however, designed to shield any particular product from legitimate local regulation simply because it may have moved in commerce, or any particular manner of doing business simply because it is conducted in more than one state. On the contrary, the opinions of this Court recognize that incidental burdens on interstate commerce are unavoidable when a State legislates to safeguard the welfare of its people. *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 185 (1938). *See also, Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). Thus, a state statute is not to be struck down solely because it has impacts upon businesses involved in interstate transactions. Rather, to be rendered invalid, a local regulation must materially subvert the national interest in maintaining free trade among the states.

The Act in question here, Minn. Laws of 1977, Chapter 268, (hereinafter "the Act"), does one simple and direct thing—it prohibits the sale of milk in throwaway plastic containers *at retail in Minnesota*. That prohibition is in no way dependent upon where the milk is produced or bottled. Nor is it dependent upon the place of origin of the bottles, their components or any associated equipment.

Contrary to the assertions of plaintiffs, the Act in no way halts the passage of any goods at the Minnesota border. Milk in plastic containers may freely flow into, through and out of Minnesota without hindrance. Likewise, all forms of machinery, resins and any other substance may freely be imported, exported and sold in Minnesota without any legal impediment from the Act, regardless of their place of origin. The Act is not a protectionist measure for the benefit of local interests at the expense of out-of-state interests, nor are the burdens, if any, on commerce, out of proportion to the legitimate local concerns addressed.

I. THE ACT IS NOT VOID AS PROTECTIONIST LEGISLATION.

Plaintiffs attempt to impugn the Act as protectionist on the basis of two or three isolated statements made in the course of the lengthy legislative debates, the typed transcription of which covers more than forty-five single-spaced pages. The only reliable way to determine the nature of the legislative debate is to review the entirety of that transcription, admitted into evidence as Plaintiffs' Exhibit J; the State is confident that such a review will strongly persuade the Court that the Act reflects sincere and legitimate environmental purposes.

As the debates show, a broad range of concerns entered the minds of individual legislators in voting on the bill, as is true of all legislation. It is for just this reason that "this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive," *United States v. O'Brien,* 391 U.S. 367, 382 (1968). As this Court explained:

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance . . . . It is entirely another matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void, essentially on the ground that it is unwise, legislation which Congress had the undoubted power to enact and which could have been reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

United States v. O'Brien, supra, 391 U.S. at 383, 384.

As is suggested by the excerpts quoted in the State's prior brief, at pages 8-16, the legislative debates in their full context demonstrate the environmental purposes of the Act. References to the plastic industry, and to economic interests, were made, as the transcription shows, in the context of arguments for excluding the environmentally bad throwaway jug before it became economically entrenched in Minnesota and before widespread reliance on it could develop, and not as a "xeno-

phobic" reaction to out-of-state interests. As has been argued previously, this is a strong reason for distinguishing between paper and plastic containers.

The Executive Director of the Minnesota Pollution Control Agency, which developed and proposed the Act, confirmed this fact, testifying that the Pollution Control Agency does not favor the use of paper cartons, and that the Act was not intended to promote their increased use, (T.637, 638), but rather to head off an impending investment by major dairies in packaging systems for the also bad throwaway plastic jug. (T.628, 629). Nor does the record indicate that the Act was supported or promoted by timber or paper interests; instead, it was supported by Minnesota's Department of Energy, Pollution Control Agency, Department of Natural Resources, and Department of Agriculture, and by the Consumer Services Division of Minnesota's Department of Commerce. (T.142).

Plaintiffs cite no case in which the statements of a small number of legislators have been held to establish that an act of neutral application is invalid as economic protectionism. Rather they cite a number of cases in which a product or service moving across state lines is subjected to a greater burden than the *same* product or service originating in-state. *E.g.*, *Lewis v. B.T. Investment Managers, Inc.*, 100 S.Ct. 2009 (1980) (local banks versus out-of-state banks); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (in-state trash versus out-of-state trash); *Hunt v. Washington State Apple Advertising Comm'n.*, 432 U.S. 333 (1977) (in-state apples versus out-of-state apples); *Polar Ice Cream and Creamery Co. v. Andrews*, 375 U.S. 361 (1964) (in-state milk sales versus out-of-state milk sales).

This is clearly not a case where "economic protectionism" offers any guidance to judicial decision. The Court cannot compare the Act's treatment of in-state versus out-of-state, trash as in *New Jersey, supra,* or apples, as in *Hunt, supra.* It is simply not the case that retail sale of milk in throwaway plastic containers is generally equated with out-of-state interests or that the sale of milk in other containers is equated with in-state interests. Rather, the record and the very arguments of the plaintiffs and their *amici* demonstrate plainly that the so-called "burdens" of the Act are not laid upon out-of-state concerns *per se* to the benefit of in-state interests *per se.*

Plaintiffs' effort to establish protectionism from the bare assertion that the most basic raw material for throwaway plastic jugs and the machines for forming them are produced out-of-state, and from the fact that Minnesota is engaged in timber production, simplistically ignores a number of critical facts:

1. The act is not "anti-plastic", since plastic is also used in the permitted returnable bottles and plastic pouches. Even the paper containers which plaintiffs oppose are coated with polyethylene.

2. The goal of the Act is not to promote paper containers; rather, it is to stop the throwaway plastic jug, as an important step away from dependence upon wasteful throwaway packaging in general.

3. There is no evidence that either the raw materials or machinery used in producing paper containers come from Minnesota companies as opposed to out-of-state or multi-state companies. The Court can take judicial notice that the timber and paper industries are national in scope; there is no reason to assume that any paper

cartons used to package Minnesota milk will not pass in interstate commerce. Nor does the record indicate that the principal maker of paper carton machinery, Ex-Cello, (T.247, 248), is located in Minnesota; thus, such machinery can be presumed to pass in interstate commerce.

4. Local interests such as M-H Packaging Systems, Inc. (hereinafter "M-H"), Marigold Foods, Inc. (hereinafter "Marigold"), and undoubtedly numerous others, are directly involved in the distribution, fabrication and marketing of resins and making plastic jugs. The mere fact that plaintiffs' witness from Texas was personally unaware of any Minnesota polyethylene producers, (T. 309), does not demonstrate that plastic is not, or cannot be, produced and fabricated in Minnesota.

5. Most directly affected by application of the Act are local retailers and dairies who desire the convenience and added profit they believe may be gained by using the throwaway plastic jug.

When all of the potential direct and indirect impacts of the Act are taken into account, there is no basis to conclude that the Act operates to promote in-state interests in general at the expense of out-of-state interest in general. Instead, while the degree of effect on local dairies, fabricators and retailers may relate to their local or in-state character, the indirect effect on out-of-state interests such as resin producers and machinery manufacturers stems form the nature of their product, rather than the geography of their operation.

II. THE ACT CREATES NO BURDENS ON COMMERCE WHICH OUTWEIGH ITS BENEFITS.

Plaintiffs argue that even if the Act is evenhanded in its effects—as it is—it fails the balancing test described in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), where this Court observed that a statute which serves a legitimate local purpose may be stricken if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Plaintiffs would have the Court use this balancing test as a guise for reinstituting the type of substantive due process review long abandoned by this Court.

As the State and *amici* have discussed at length in prior briefs, the state has a strong and proper interest in addressing the resource, energy and environmental concerns arising, *inter alia*, from the proliferation of throwaway packaging. The instant Act constitutes a modest, but appropriate, step in addressing such problems. Against this important state interest, plaintiffs pose no showing of a burden on commerce. Rather they assert an alleged general detriment to particular companies, both in and out of Minnesota, which are engaged in commerce. Plaintiffs complain that the Act will "increase their costs of doing business and decrease their already slight profit margins." (Brief for Respondents, 28). While the cost of compliance with a regulation is not, in every case, "entirely irrelevant," it is never sufficient in itself to invalidate a statute on commerce clause grounds. *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 445 (1978); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 526 (1959). Nor is every added cost a burden on interstate commerce. Rather, commerce clause analysis requires a more searching examination of the nature and extent of a statute's impact, to de-

termine whether it impairs the types of interests protected by the commerce clause. Under such analysis, the claims of the plaintiffs dissolve.

A. The Act Does Not Burden Interstate Commerce In Petroleum Products.

Plaintiffs complain earnestly that the Act imposes a "severe" burden on the plastics industry, and that raw material and equipment for making plastic are "halted at the Minnesota border." (Respondents' Brief 27). It is true that the Act will preclude the frivolous use of gas and oil for throwaway milk containers in Minnesota. Like every other economic regulation, the Act thus incidently curtails, or inhibits, one form of business activity. To point out that a statute has an impact, however, is to beg the question whether that impact constitutes a burden on interstate commerce, and whether any such burden is excessive.

The impact on plaintiff Phillips Petroleum Company (hereinafter "Phillips") and other petro-chemical companies is both minimal and nondiscriminatory.

It is silly to assert that non-Minnesota producers, such as Phillips, have their products "halted at the Minnesota border." Phillips and other refiners are free to ship natural gas, polyethylene resins, or plastic bottles, into, through, or out of Minnesota. Polyethylene, of course, is used for thousands of products other than milk containers. (T.308). The use and shipment of polyethylene for these other purposes is absolutely unaffected by the Act's ban on this particularly wasteful use. Even with regard to throwaway bottles, Phillips is free to ship resins to Minnesota for use in making bottles for products other than milk, and even for use by Minnesota milk

bottle producers such as M-H and Marigold, who sell milk or plastic jugs, or both, in other states. Nor is there any restriction on products passing through, or from, Minnesota for sale elsewhere.

Most importantly, the overall impact on Phillips is relatively insubstantial. Phillips is a large, multi-national petrochemical company, and strongly urges the necessity of wise use and conservation of natural gas. (T.312, 313). Yet in this litigation it vigorously opposes local elimination of this frivolous container, despite the fact that Minnesota throwaway milk containers account for less than one one-hundredth of one percent of Phillips' sales (T.322); despite the fact that demand for its polyethylene resins for other uses is expanding rapidly (T.317, 318); and despite the fact that the millions of cubic feet of natural gas used to make these frivolous containers could instead be used for heating or energy production.

B. The Act Does Not Impose An Impermissible Burden On The Plastics Industry Generally.

The Society of the Plastics Industry, Inc. (hereinafter "SPI"), the trade association of the plastics industry, complains that its members will lose sales. As has been argued previously, elimination of throwaway plastic bottles in Minnesota is likely to promote the use of the vastly preferable returnable plastic bottle or, as was the case in Ontario, the similarly superior plastic pouch. Like the throwaways, these alternative packages would be made of plastic produced and sold by SPI's members. It is perhaps understandable that plastic manufacturers might prefer to sell containers which are thrown away after a single use, rather than reusable containers which are refilled as many as 150 times

before they are discarded, but the commerce clause does not protect such preferences.

Plaintiffs' unproven claim that the Act will encourage use of paper cartons amounts to no more than an assertion that one portion of the national packaging industry may benefit at the expense of another portion of the industry. Assuming, *arguendo*, that plaintiffs' unproven claim is correct, it would nevertheless not be cognizable under the commerce clause. The commerce clause does not protect particular firms from the burdens of regulation, nor does it protect the particular structure or method of operation in a market. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978). A minor realignment of the packaging market, benefiting one element of the industry relative to another, is a matter of constitutional indifference.

C. The Act Does Not Impose An Unconstitutional Burden On Commerce In Packaging Equipment.

The Uniloy Division of Hoover Universal, Inc. (hereinafter "Hoover"), the principal maker of the machines which make plastic milk bottles, with total annual sales of $500,000,000 (T.266), complains that the Act will cost it sales.[3] Again, this is not the type of "burden" cognizable under the commerce clause.

By encouraging the use of returnable plastic milk bottles, the Act may well generate other sales for Hoover, because

[3] If dairies were free to use throwaway plastic containers, they would have the option of buying throwaway containers from molders who have already purchased molding machinery, such as plaintiffs Marigold and M-H. It does not follow, therefore, that increased use of throwaway jugs would necessarily generate sales for Hoover. Furthermore, due to the long useful life of Hoover machines, (T.259) any sales would not be regularly recurring.

Hoover machines can be designed or adapted to make returnable bottles. (T.252, 253). Or the Act may generate interstate sales of the machinery used to make glass bottles or plastic pouches. Even if plaintiffs are correct, and the Act increases sales of paper cartons, sales may simply shift from Hoover to other non-Minnesota companies supplying paper carton machinery. Again, the question as to which of these interstate competitors receives the most business for Minnesota milk containers is of no constitutional significance whatever. *C.f. Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 127 (1978).

D. The Act Does Not Unconstitutionally Burden Interstate Commerce In Containers.

Plaintiff M-H is a small Minnesota maker of throwaway plastic bottles, which it produces on a single Hoover machine. (T. 284, 285). Plaintiffs' complaint that M-H will lose sales under the Act illustrates the fallacious nature of their commerce clause arguments generally. The Act affects only the Minnesota sales of this Minnesota business. That, obviously, is not interstate commerce.

The Act does not restrict M-H in its production of plastic bottles for sale outside Minnesota, or of bottles for products other than milk. Plaintiffs apparently assert that a loss of Minnesota business[4] will reduce M-H's total volume, and thus

[4] It is not at all clear whether, or to what extent, M-H will be damaged by the Act, even in its in-state business. At the time M-H began production in 1977, its Illinois owners were aware of the then-pending ban on throwaway milk bottles, and they therefore arranged for M-H's plant to be operated under a 5-year lease arrangement allowing them to cancel the lease if throwaway plastic milk containers are banned. (T.293-295). Approximately 30 percent of M-H's business is attributable to the sale of throwaway containers for milk in Minnesota. (T.283, 284). Even if plaintiffs

reduce the profitability of its non-Minnesota sales. Plaintiffs apparently contend that these profits are constitutionally protected, and that states may not regulate even intrastate business activities, if the result is to impair overall profits. The commerce clause has never been so construed.

E. The Act Does Not Unconstitutionally Burden Interstate Sales By Local Dairies.

Plaintiffs next complain that the Act will impose added costs on Minnesota dairies Marigold and Clover Leaf Creamery Company (hereinafter "Clover Leaf"). Again, the Act does not limit or regulate the out-of-state sales of these businesses. The impact of Minnesota regulations on the Minnesota sales of these Minnesota businesses is simply not a matter of interstate commerce.

Plaintiffs strain unsuccessfully to transform the impact on these Minnesota businesses into an interstate issue, arguing that elimination of throwaway plastic containers from the Minnesota market will indirectly burden the out-of-state sales of Marigold and Clover Leaf. The roundabout argument is that, for competitive purposes, these dairies would prefer to use throwaway containers outside Minnesota, but that without Minnesota sales to help reduce their per-unit costs, it will be more expensive for them to do so.

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were to prevail in this action, M-H is likely to lose sales. If plaintiff Hoover is able to renew those machinery sales which were cancelled when the Act was passed, M-H will lose major customers accounting for approximately two-thirds of its Minnesota milk sales. (T. 299). In contrast, if the Act is upheld, M-H can modify its machines to produce reuseable plastic bottles; the only reason it has not yet done so is that its customers have not demanded returnables. (T.288). The underlying purpose of the Act, as has been previously argued, is to encourage the use of just such returnables.

Any indirect impact on such non-Minnesota sales is at best conjectural, if not totally imaginary. Marigold's Chairman admitted that, with or without a Minnesota market, Marigold would continue to sell the throwaways in other states. (T.474). These sales are unaffected by the Act. Marigold, Clover Leaf and other Minnesota dairies are free to package their out-of-state sales in any way they choose. They can make plastic throwaways exclusively for out-of-state use, as Marigold did for several years before it began selling them within Minnesota. (T.458). Alternatively, they can purchase plastic throwaways for out-of-state sales from molders such as M-H; they can sell their out-of-state milk in the standard half gallon package, the half gallon paper carton which they presently offer both in Minnesota and elsewhere; or they can market their out-of-state milk in gallon paper cartons, in plastic pouches, or in returnable bottles. In none of these cases will the Act burden interstate commerce.

F. The Act Does Not Unconstitutionally Burden Minnesota Sales By Out-Of-State Dairies.

Plaintiff Wells Dairy, Inc. (hereinafter "Wells"), an Iowa dairy, complains that it will be unable to use throwaway plastic containers for the ten percent of its sales which are made in Minnesota. The record, however, shows that forty percent of Wells' milk is already sold in containers other than the throwaway plastic jug, including both the paper half gallon and the paper gallon. (T. 419, 426, 439). This hardly supports any suggestion that Wells cannot market its milk in anything but the plastic jug.

Most importantly, Wells' witness indicated no impairment of ability to serve a Minnesota market under the Act. Rather

he testified that, if the Act is upheld, Wells will simply bottle its Minnesota milk on its presently underused paper carton machinery. (T.427, 441). Alternatively, Wells may choose an environmentally preferable course, and start up the environmentally superior plastic pouch packaging machinery at one of its dairies, machinery which Wells shut down immediately after buying the dairy in order to substitute the throwaway plastic jug. (T.444-45). In either case, the Act will not have imposed an impermissible burden on Wells' sales as an out-of-state dairy.

G. There Is No Showing Of Unconstitutional Burden On Retailers.

The only retailer offering evidence is Weber & Barlow Stores, Inc. (hereinafter "Barlow"). Barlow is a Minnesota corporation engaged in retail grocery sales including sales of milk products in Rochester, Minnesota, and elsewhere. (T.409-10). Barlow introduced no evidence that the Act would have any effect upon its business, aside from its effect on Barlow's general desire to respond to consumer preferences. (T.409-14).

Thus, the case here is totally devoid of the types of impacts which have been found, in other cases, to constitute excessive burdens on commerce. Plainly, there is no overt distinction made on the basis of the geographic origin of any goods, as in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951) or the home state of a would-be competitor, as in *Lewis v. B.T. Investment Managers, Inc.*, 100 S.Ct. 2009 (1980).

There is no interference with the physical flow of commerce, as in *Raymond Motor Transportation, Inc. v. Rice*, 434

U.S. 429 (1978), and *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959). Also absent is any state effort whatsoever to impose restrictions upon goods leaving the state. *C.f. Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949). Nor are interstate businesses subjected to multiple and contradictory requirements by several states.

There is not even the sort of indirect, circumstantial discrimination against a particular state's products *per se*, and in favor of a local version of the same product, which characterized the unique case of *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), upon which plaintiffs place heavy reliance. In that case, a North Carolina statute conflicted with a mandatory Washington apple grading system which was concededly superior to all others, and which provided Washington apple growers with a unique and justified competitive advantage. Application of the act, which precluded the use of all state grading, removed that competitive threat to local growers of the *same product*, and placed the costly burdens of changing marketing practices upon Washington growers as such, without requiring any comparable changes for local growers. Significantly, the Court's holding was limited to the unique situation of the mandatory, superior Washington apple grades.

The question before the Court closely resembles that in *Pacific States Box & Basket Co. v. White*, 296 U.S. 176 (1935), in which this Court upheld Oregon administrative regulations prescribing in detail the capacity, dimensions and configuration of containers for the sale of berries. There, the plaintiff, a California maker of containers not authorized by the regulations, complained that interstate commerce was unduly burdened. This Court disagreed, pointing out that the regulation

applied equally to containers of in-state and out-of-state origin, that plaintiff was free to sell its containers in Oregon for other uses, and that to sustain the plaintiff's argument would have been "to hold that its containers, because of their origin, are entitled to immunity from the exercise of the state regulatory power." *Id.*, 296 U.S. at 184.

Also noticeably lacking in this case is any suggestion that the State's admittedly legitimate goals might be advanced by means which impose fewer burdens upon the flow of commerce. Even plaintiffs candidly admit[5] that alternative means of discouraging or eliminating unnecessarily wasteful throwaway packaging will involve the same or greater burdens upon all of the plaintiffs. Indeed, such packaging cannot be reduced or eliminated without imposing the types of impacts which plaintiffs attack here as "burdens on commerce".

What plaintiffs style as the "most obvious" alternative (*i.e.*, an immediate and simultaneous ban on both plastic and paper throwaways) would relieve no burdens on any of the complaining parties, but would instead be ruinous to in-state and out-of-state dairies alike, who would have no immediate fall-back container for Minnesota sales.

When viewed in its entirety, plaintiffs' commerce clause argument is simply a cleverly disguised invitation for the Court to resurrect substantive due process under another name. They point to no interference with interstate commerce *per se*. Rather they urge that because the Act may work an economic disadvantage on certain businesses which are involved in interstate commerce, the Court should either void the Act outright under the commerce clause, or attempt to weigh the wisdom and efficacy of the Act as against plain-

[5] Respondents' Brief at 32-33.

tiffs' desire to make more sales, and to reduce overall costs.[6]

In this regard, plaintiffs' "balancing" argument closely resembles an argument advanced by the plaintiffs in *Proctor and Gamble Company v. City of Chicago*, 509 F.2d 69 (7th Cir. 1975), *cert. den.*, 412 U.S. 978 (1975). There, plaintiff Proctor and Gamble attacked a Chicago ban on the sale of phosphate detergents, arguing that the added cost of marketing a separate line of detergent for Chicago would burden interstate commerce, just as the instant plaintiffs argue that the Act will force them to use different containers for Minnesota and non-Minnesota sales. The Court of Appeals rejected this contention and correctly recognized Proctor and Gamble's arguments as substantive due process claims under another name, holding:

> Another argument presented by plaintiffs is that the ordinance burdens interstate commerce because it amounts to an embargo on a safe, useful, and unique product of commerce without any corresponding local benefit. We find no merit to this argument. In essence, it is not a Commerce Clause argument but one based on substantive due process, an issue not before us. The only Commerce Clause cases cited for this proposition involve situations in which a state has attempted to achieve a local purpose by discriminating against out-of-state producers or manufacturers. There is no discrimination in this case. The ordinance does not require that detergents be manufactured in Chicago or Illinois and does not benefit manufacturers who are located there.

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[6] This Court has expressly held that "[t]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." Exxon Corp. v. Governor of Maryland, supra, 437 U.S. at 127.

Id., 509 F.2d at 77-78. The Act before this Court, like the ordinance in the *Proctor and Gamble* case, imposes no burden on interstate commerce *as such*, and should not be set aside on the basis of what are, in essence, substantive due process arguments.

It is almost impossible to conceive of any police power regulation which does not affect some business which is located out of state or which engages in interstate commerce. Therefore, if plaintiffs' arguments are adopted, the commerce clause would require courts to undertake the legislative function of balancing public benefits against the added costs to private businesses with respect to every piece of legislation.

CONCLUSION

The Act does not burden interstate commerce as such. Its indirect effects on commerce are minimal, and are imposed evenhandedly on local and out-of-state interests. Plaintiffs' substantive due process arguments, whether advanced under the guise of equal protection, due process or the commerce clause, should be rejected by this Court.

For all the preceding reasons, and for the reasons stated in Petitioner's previous brief, the State of Minnesota respectfully requests that the Court reverse the decision of the Minnesota Supreme Court and affirm the Act in all respects.

Respectfully submitted,

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